

**ELECTRONICALLY FILED ON JULY 20, 2009**

**PATENT  
Dkt. HO-P02393US0**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of: **Timothy E. Grib and Michael A. Brown**  
Assignee: **WITEL COMMUNICATIONS GROUP, INC.**  
Application No.: **09/964,232** Group No.: **2443**  
Filed: **September 26, 2001** Examiner: **Kyung H. Shin**  
For: **METHOD AND APPARATUS FOR PERFORMANCE  
MEASUREMENT OF DIFFERENT NETWORK ROUTES  
BETWEEN DEVICES**

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Commissioner for Patents  
P. O. Box 1450  
Alexandria, Virginia 22313-1450**

**ATTENTION: Board of Patent Appeals and Interferences**

**Sir:**

**APPELLANT'S AMENDED BRIEF**

This Amended Appeal Brief is being filed in response to the Notice of Non-Compliant Appeal Brief mailed June 18, 2009. In the instant Amended Appeal Brief, Appellants have amended sections VI and VII, as set forth below, and it is submitted that no fees are required in conjunction with the filing of this Amended Appeal Brief.

This brief contains these items under the following headings, and in the order set forth below:

- I. REAL PARTY IN INTEREST
- II. RELATED APPEALS AND INTERFERENCES
- III. STATUS OF CLAIMS
- IV. STATUS OF AMENDMENTS
- V. SUMMARY OF CLAIMED SUBJECT MATTER
- VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL
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## **I. REAL PARTY IN INTEREST**

The real party in interest in this Appeal is Wiltel Communications Group, Inc.

## **II. RELATED APPEALS AND INTERFERENCES**

There are no other appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board's decision in this Appeal.

## **III. STATUS OF CLAIMS**

The status of the claim in this application is:

<u>Claim</u>	<u>Status</u>
1. (Previously presented)	Independent.
2. (Original)	Dependent from claim 1.
3. (Original)	Dependent from claim 2.
4. (Original)	Dependent from claim 3.
5. (Original)	Dependent from claim 1.
6. (Original)	Dependent from claim 1.
7. (Original)	Dependent from claim 6.
8. (Original)	Dependent from claim 7.
9. (Original)	Dependent from claim 6.
10. (Original)	Dependent from claim 6.
11. (Original)	Dependent from claim 10.
12. (Original)	Dependent from claim 6.
13. (Original)	Dependent from claim 6.
14. (Original)	Dependent from claim 13.
15. (Previously presented)	Independent.
16. (Previously presented)	Independent.
17. (Original)	Dependent from claim 16.
18. (Original)	Dependent from claim 16.
19. (Original)	Dependent from claim 16.
20. (Original)	Dependent from claim 19.
21. (Previously presented)	Independent.
22. (Original)	Dependent from claim 21.
23. (Original)	Dependent from claim 21.
24. (Original)	Dependent from claim 23.
25. (Original)	Dependent from claim 24.
26. (Original)	Dependent from claim 25.
27. (Original)	Dependent from claim 23.
28. (Original)	Dependent from claim 27.
29. (Original)	Dependent from claim 28.

#### **A. TOTAL NUMBER OF CLAIMS IN APPLICATION**

Claim in the application: 1-29.

#### **B. STATUS OF ALL THE CLAIMS**

1. Claims canceled: None.
2. Claims withdrawn from consideration but not canceled: None.
3. Claims pending: 1-29.
4. Claims allowed: None.
5. Claims rejected: 1-29.
6. Claims objected to: None.

#### **C. CLAIMS ON APPEAL**

Claim now on appeal: 1-29.

#### **IV. STATUS OF AMENDMENTS**

No post-final amendments have been submitted.

#### **V. SUMMARY OF CLAIMED SUBJECT MATTER**

The Application contains four independent claims, namely, claims 1, 15, 16, and 21, all of which are the subject of this Appeal. The subject matter of these claims is summarized below, along with the subject matter of dependent claims 2 and 17.

Claims 1, 15, 16, and 21 relate generally to the field of performance measurements of different network routes between devices. *See* Application, page 1, lines 7-9. The performance measurements may be made via simultaneous execution of a first performance test of a first type over a first path between a first and a second device and a second performance test of the first type over a second path between the first and second devices. *See* Application, page 3, lines 4-8. In this manner, performance attributes of the paths such

as network layer round trip latency, loss, one-way jitter, and/or hop count, may be determined and reported, for example, to another process or device. *See* Application, page 11, lines 7-13.

With regard to the aspect of the invention set forth in independent claim 1, discussions of the recited features of claim 1 can be found at least in the below cited locations of the specification and drawings. By way of example, present embodiments include a method (e.g., FIG. 5B) performed by one or more components (e.g., 102, 103; Application, page 6, lines 17-20) in a network (e.g., 100) comprising a plurality of paths (e.g., 111 and 112) between a first device (e.g., 110) and a second device (e.g., 120), the method comprising conducting a first performance test of a first type (e.g., Application, page 5, lines 23-24) over a first path (e.g., 111) of the plurality of paths (e.g., 111 and 112) between the first (e.g., 110) and second devices (e.g., 120), conducting a second performance test of the first type (e.g., Application, page 5, lines 24-25) over a second path (e.g., 111) of the plurality of paths (e.g., 111 and 112) between the first (e.g., 110) and second devices (e.g., 120), and wherein a processor (e.g., 115, 241) initiates the simultaneous execution of the first and the second non-sequential performance tests (e.g., Application, page 5, lines 25-27).

With regard to the aspect of the invention set forth in dependent claim 2, discussions of the recited features of claim 2 can be found at least in the below cited locations of the specification and drawings. By way of example, present embodiments include the first performance test produces a first set of results (e.g., page 5, lines 23-24 and page 6, lines 1-4), wherein the second performance test produces a second set of results (e.g., page 5, lines 23-24 and page 6, lines 1-4), and further comprising presenting a service level performance

comparison based on the first and second sets of results (e.g., page 11, line 27 – page 12, line 1).

With regard to the aspect of the invention set forth in independent claim 15, discussions of the recited features of claim 15 can be found at least in the below cited locations of the specification and drawings. By way of example, present embodiments include A computer-readable medium (e.g., 242) containing computer-executable instructions for performing a method by steps (page 7, lines 21-24) comprising conducting a first performance test of a first type (e.g., Application, page 5, lines 23-24) over a first path (e.g., 111) of a plurality of paths (e.g., 111 and 112) between a first (e.g., 110) and second devices (e.g. 120), conducting a second performance test of the first type (e.g., Application, page 5, lines 24-25) over a second path (e.g., 111) of the plurality of paths (e.g., 111 and 112) between the first (e.g., 110) and second devices (e.g., 120), and wherein a processor (e.g., 115, 241) initiates the simultaneous execution of the first and the second non-sequential performance tests (e.g., Application, page 5, lines 25-27).

With regard to the aspect of the invention set forth in independent claim 16, discussions of the recited features of claim 16 can be found at least in the below cited locations of the specification and drawings. By way of example, present embodiments include a network (e.g., 100) comprising a plurality of paths (e.g., 111, 112) between a first device (e.g., 110) and a second device (e.g., 120), means for (e.g., 102, 103, 115, 241) conducting a first performance test of a first type (e.g., Application, page 5, lines 23-24) over a first path (e.g., 111) of the plurality of paths (e.g., 111 and 112) between the first (e.g., 110) and second devices (e.g., 120), means for (e.g., 115, 122, 123, 241) conducting a second performance test of the first type (e.g., Application, page 5, lines 24-25) over a second path

(e.g., 112) of the plurality of paths (e.g., 111 and 112) between the first (e.g., 110) and second devices (e.g., 120), and wherein a processor (e.g., 115, 241) initiates the simultaneous execution of the first and the second non-sequential performance tests (e.g., Application, page 5, lines 25-27).

With regard to the aspect of the invention set forth in dependent claim 17, discussions of the recited features of claim 17 can be found at least in the below cited locations of the specification and drawings. By way of example, present embodiments include said means for conducting the first performance test (e.g., 102, 103, 115, 241) includes means for (e.g., 102, 103, 115, 241) generating a first set of results (e.g., page 6, line 26 – page 7, line 2); wherein said means for conducting the second performance test (e.g., 115, 122, 123, 241) includes means for (e.g., 115, 122, 123, 241) generating a second set of results (e.g., page 6, line 26 – page 7, line 2), and further comprising means for (e.g., page 11, line 20) presenting a service level performance comparison based on the first and second sets of results (e.g., page 11, line 27 – page 12, line 1).

With regard to the aspect of the invention set forth in independent claim 21, discussions of the recited features of claim 21 can be found at least in the below cited locations of the specification and drawings. By way of example, present embodiments include a network (e.g., 100) comprising a first device (e.g., 110) coupled to a first access network (e.g., 101), the first access network (e.g., 101) coupled to a first (e.g., 111) and a second transport networks (e.g., 112), a second access network (e.g., 121) coupled to the first (e.g., 111) and the second transport networks (e.g., 112), a second device (e.g., 120) coupled to the second access network (e.g., 121), and wherein a processor (e.g., 115, 241) initiates the simultaneous execution of a performance test (e.g., Application, page 5, lines 23-25) between

the first device (e.g., 110) and the second device (e.g., 120) over each of the first (e.g., 111) and second transport networks (e.g., 112) simultaneously (e.g., Application, page 5, lines 25-27).

There is a clear difference and distinction between the above referenced claims and the prior art, as discussed below.

## **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

### **1. First Ground of Rejection for Review on Appeal:**

Appellants respectfully urge the Board to review and reverse the Examiner's first ground of rejection in which the Examiner rejected claim 15 under 35 U.S.C. §101 as being directed to non-statutory subject matter.

### **2. Second Ground of Rejection for Review on Appeal:**

Appellants respectfully urge the Board to review and reverse the Examiner's second ground of rejection in which the Examiner rejected claims 1-4, 15-17, and 21 under 35 U.S.C. §102(e) as being anticipated by United States Patent No. 5,627,766 issued to Paul A. Beaven, May 6, 1997 (hereinafter "Beaven").

### **3. Third Ground of Rejection for Review on Appeal:**

Appellants respectfully urge the Board to review and reverse the Examiner's third ground of rejection in which the Examiner rejected claims 5-9, 13, and 18-29 under 35 U.S.C. §103(a) as being anticipated by Beaven in view of United States Patent No. 6,763,380 issued to Kim Irvin Mayton et al., July 13, 2004 (hereinafter "Mayton").

**4. Fourth Ground of Rejection of Review on Appeal:**

Appellants respectfully urge the Board to review and reverse the Examiner's fourth ground of rejection in which the Examiner rejected claims 10, 11, and 14 under 35 U.S.C. §103(a) as being anticipated by Beaven in view of Mayton and further in view of United States Patent No. 6,360,268 issued to Silva et al., March 19, 2002 (hereinafter "Silva").

**5. Fifth Ground of Rejection of Review on Appeal:**

Appellants respectfully urge the Board to review and reverse the Examiner's fifth ground of rejection in which the Examiner rejected claim 12 under 35 U.S.C. §103(a) as being anticipated by Beaven in view of Mayton and further in view of United States Patent Application No. 2003/0036865 issued to Zhou et al., February 20, 2003 (hereinafter "Zhou").

**VII. ARGUMENT**

As discussed in detail below, the Examiner has improperly rejected the pending claims. Further, the Examiner has misapplied long-standing and binding legal precedents and principles in rejecting the claims under Sections 101, 102, and 103. Accordingly, Appellant respectfully requests full and favorable consideration by the Board, as Appellant strongly believes that claims 1-29 are currently in condition for allowance.

**A. Ground of Rejection No. 1:**

The Examiner rejected claim 15 as not being drawn to statutory subject matter. Specifically, the Examiner reasoned that claim 15 is not limited to tangible embodiments, and, as such, is not limited to statutory subject matter. Appellants respectfully traverse this rejection.



### ***Legal Precedent***

Statutory subject matter, as set forth in Section 101, includes "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C. § 101. As such, according to the Supreme Court, congress intended statutory subject matter to "include anything under the sun that is made by man." *Diamond v. Chakrabarty*, 447 U.S. 303, 308-09; 206 U.S.P.Q. 193, 197 (1980). In particular, it is clear that claims directed to products, apparatuses and devices are clearly statutorily patentable. As set forth in M.P.E.P § 2106(II)(c), "For products, the claim limitations will define discrete physical structures or materials. Product claims are claims that are directed to either machines, manufactures, or compositions of matter."

Additionally, the Federal Circuit has developed a test which may be used to determine if a claim recites statutory subject matter, namely whether the claim produces a "useful, concrete, and tangible result." *In re Alappat*, 31 U.S.P.Q.2d 1545, 1557 (Fed. Cir. 1994) (*en banc*). The Federal Circuit has stated "the dispositive inquiry is whether the claim *as a whole* is directed to statutory subject matter." *Id.* The Federal Circuit elaborated by holding that one must look to "the essential characteristics of the subject matter, in particular, its practical utility." *State Street Bank & Trust Co. v. Signature Financial Group Inc.*, 47 U.S.P.Q.2d 1596, 1602 (Fed. Cir. 1998). Moreover, the Federal Circuit has stated "the *Alappat* inquiry simply requires an examination of the contested claims to see if the claimed subject matter *as a whole* is a disembodied mathematical concept representing nothing more than a 'law of nature' or an 'abstract idea,' or if the mathematical concept has been reduced to *some practical application rendering it 'useful.'*" *AT&T Corp. v. Excel Communications*,

*Inc.*, 50 U.S.P.Q.2d 1447, 1451 (Fed. Cir. 1999) (emphasis added). In other words, “Is an actual process machine, manufacture, or composition of matter being claimed in accordance with 35 U.S.C. §101, or is the claim drawn to an abstraction?” Therefore, if a claim, read as a whole and in light of the specification, produces any useful, concrete, and tangible result, the claim meets the statutory requirements of Section 101. *See id.*

***Claim 15 Recites Statutory Subject Matter***

Claim 15 recites, *inter alia*, “a computer-readable medium containing computer-executable instructions for performing a method.” Appellants respectfully assert that a computer-readable medium qualifies at least as a machine or manufacture, and as such, qualifies as statutory subject matter under Section 101. Furthermore, the specification of the instant application confirms this assertion.

The specification describes a machine readable medium for performing the steps recited in independent claim 15. *See* Application, page 7, lines 21-24. Specifically, the combination of a processor 241 working in conjunction with memory 242 is described as performing the steps described in the remainder of the application. *See id.* However, the Examiner appears to have ignored this section of the application, instead pointing to a subsequent section of the application to attempt to suggest that claim 15 is directed to non-statutory subject matter.

Specifically, the Examiner appears to be relying on page 8, lines 3-8 of the specification of the instant application to maintain the Section 101 rejection, specifically with respect to the terms “signaling mechanisms” and “signals received and transmitted.” *See* Final Office Action, page 6. Indeed, it appears that the Examiner read “signaling

mechanisms” and “signals received and transmitted” as non-statutory classes of a computer-readable medium. *See id.* at page 7. However, a signaling mechanism is a *physical device*. As such, a signaling mechanism qualifies at least as a machine for § 101 purposes. Because a machine is a class of statutory subject matter under § 101, signaling mechanisms, as described in the specification, are drawn to statutory subject matter.

Furthermore, the Examiner has misread the specification in suggesting that “signals received and transmitted” is directed to non-statutory subject matter. The Examiner has apparently read this phrase out of context, which appears to have led to an erroneous conclusion. This portion of the specification is correctly read to be “as well as any communications device and signals received and transmitted.” This must be the proper reading because the entire clause is set apart by commas. As such, it must be read as a whole. Accordingly, when the aforementioned clause is read as a whole, the signals received and transmitted are described only in conjunction with a communications device, *i.e.*, a machine. Thus, this section of the specification details the operation of a machine, specifically a communications device that receives and transmits signals. As described above, a machine is a proper category of statutory matter. Therefore, the communications device and signals received and transmitted are drawn to statutory subject matter.

Accordingly, when the specification of the instant application is properly interpreted, claim 15 is seen to be limited to only tangible embodiments, and, as such, is limited to statutory subject matter. For at least these reasons, among others, Appellants respectfully request that the Board overturn the rejection under 35 U.S.C. § 101 of independent claim 15.

**B. Ground of Rejection No. 2:**

The Examiner rejected claims 1-4, 15-17, and 21 under 35 U.S.C. §102(e) as being anticipated by Beaven. Appellants respectfully traverse this rejection.

***Legal Precedent***

Anticipation means a lack of novelty, and is a question of fact which is reviewed by the reviewing court using a substantial evidence standard. *Brown v. 3M*, 60 USPQ2d 1375 (Fed. Cir. 2001); *Baxter Int'l, Inc. v. McGaw, Inc.*, 47 USPQ2d 1225 (Fed. Cir. 1998). To anticipate a claim, every limitation of the claim must be found in a single prior art reference, arranged as in the claim. *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 58 USPQ2d 1286 (Fed. Cir. 2001). *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 122 S.Ct. 1831 (2002). Each such limitation must be found either expressly or inherently in the prior art reference. *Schering Corporation v. Geneva Pharmaceuticals, Inc.*, 02-1540, Decided August 1, 2003 (Fed. Cir. 2003). Accordingly, Appellants need only point to a single element not found in the cited reference to demonstrate that the cited reference fails to anticipate the claimed subject matter.

***Omitted Features of Independent Claims 1, 15, and 16***

Independent claims 1, 15, and 16 recite conducting a first performance test of a first type over a first path of the plurality of paths between a first and second device and conducting a second performance test of the first type over a second path of the plurality of paths between the first and second device wherein a processor initiates the simultaneous execution of the first and the second non-sequential performance tests.

The Examiner relied on Beaven to anticipate the aforementioned claim recitations. *See* Final Office Action, pages 7, 9, and 10. However, unlike the language recited in claims 1, 15, and 16, Beaven fails to describe processor initiated simultaneous execution of a first performance test of a first type and a second performance test of the first type over a first and second path between a first and a second device.

Instead, Beaven describes monitoring a network from a single point of control (POC). *See* Beaven, col. 2, lines 40-44. This POC transmits a test to a single node test program entity (NTP). *See* Beaven, col. 2, lines 45-49; col. 3, lines 4-7. The single NTP then transmits a reply message to the POC and forwards the original transmission from the POC to other NTPs. *Id.* at col. 2, lines 50-54; col. 3, lines 10-16. These NTPs then transmit reply messages to the POC while forwarding on the original transmission from the POC to subsequent NTPs. *Id.* at 55-59; col. 3, lines 10-16. The key aspect of this system is that the POC initially injects a single test message into the network as a performance test from a single POC. *See* Beaven, col. 4, lines 5-8.

Indeed, Beaven specifically describes initialization of a second test as occurring at a different node, i.e. a second POC, from the POC that originated the initial test, specifically stating that the disclosure provides for enabling “multiple tests initiated at different nodes to be running simultaneously.” *See* Beaven, col. 4, lines 11-12 (emphasis added). Thus, unlike the recitations of independent claims 1, 15, and 16, Beaven describes conducting a first test of a first type along a first path, and a second test of a first type along a second path between two device from two distinct POC’s, and not from a processor, i.e. a single point, as recited in independent claims 1, 15, and 16 since simultaneous tests are described by Beaven as being initiated at different points, i.e., nodes.

For example, if one were to assume that the POC of Beaven was a processor, then, as shown above, the POC may be a processor that initiates a test to a single node test program entity (NTP), which subsequently transmits a reply message to the POC and forwards the original transmission from the POC to other NTPs. *See* Beaven, col. 2, lines 45-54; col. 3, lines 4-7 and 10-16. Moreover, since Beaven details that additional tests may be initiated at different nodes, i.e. POCs, which, based on the Examiner's reading, would be secondary processors. *See* Beaven, col. 4, lines 11-13. Therefore, at best, based on these executed tests from different POC's, simultaneous *monitoring* of network paths may be accomplished via the multiple POCs. *See id.*, lines 9-13. However, simultaneous *monitoring* of multiple nodes does anticipate a processor initiating a simultaneous *execution* of a first and second non-sequential performance test. Additionally, a skilled artisan understands that the term *monitoring* implicitly means observing/measuring the effect, result, or response of an actual occurrence of a given event, and not the initiation of the event. Whereas the term *execution* within the context of the claim as informed by the specification means carrying out or causing an event to occur. Monitoring looks for the actual occurrence of an event having been previously caused by a preceding act, i.e., the *execution* of the event.

For example, a first test may be initiated at some first time T1, and a second test may be initiated at a later second time T2. Subsequent to T2, simultaneous *monitoring* of the tests may occur, but this simultaneous *monitoring* does not equate with simultaneous *execution* of the tests. There is simply no description in Beaven of simultaneous execution of the tests from a POC. Thus, Beaven fails to anticipate both initiation of tests from a single point, i.e. a processor, as well as *simultaneous execution* of the first and the second non-sequential performance tests as recited in independent claims 1, 15, and 16.

Thus, although Beaven may be read as describing initiating a single test that may be dispersed into multiple tests after being received by the initial NTP, the only description of simultaneous execution of two tests are in conjunction with separate POCs. Therefore, Beaven cannot be read as describing processor initiated simultaneous execution of a first performance test of a first type and a second performance test of the first type over a first and second path between a first and a second device, as recited by independent claims 1, 15, and 16.

Accordingly, Beaven fails to anticipate every recitation of independent claims 1, 15, and 16. Furthermore, based at least upon their dependency to claims 1, 16, and 21, Appellants respectfully submit that claims 2-14 and 17-20 are not anticipated by Beaven. For at least these reasons among others, Appellants respectfully request that the Board overturn the rejections under 35 U.S.C. § 102(e) of independent claims 1, 15, and 16, as well as all claims depending therefrom.

#### ***Omitted Features of Claims 2 and 17***

Claims 2 and 17 recite conducting a first performance test to produce a first set of results, conducting a second performance test to produces a second set of results, and presenting a service level performance comparison based on the first and second sets of results.

The Examiner relied on Beaven to anticipate the aforementioned claim recitations. *See* Final Office Action, pages 8 and 10-11. However, the cited portions of Beaven, at best, appear to describe the POC analyzing the performance of various links and nodes in a network. *See* Beaven, col. 3, lines 19-24 and 58-67. However, there is no indication in

Beaven that analyzing the performance of links in a network from the same device as is used to initiate the tests describes presenting a service level performance comparison based on the first and second sets of results, as recited in claims 2 and 17. Specifically, there appears to be no description of a presentation of a comparison made by the POC of Beaven. Accordingly, Appellants respectfully submit that the cited portions of Beaven fail to anticipate all elements of claims 2 and 17. Therefore, for at least these reasons among others, Appellants respectfully request that the Board overturn the rejections under 35 U.S.C. § 102(e) of claims 2 and 17, as well as all claims depending therefrom.

**C. Ground of Rejection No. 3:**

The Examiner rejected claims 5-9, 13, and 18-29 under 35 U.S.C. §103(a) as being anticipated by Beaven in view of Mayton. Appellants respectfully traverse this rejection.

***Legal Precedent***

To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). If an independent claim is nonobvious under 35 U.S.C. §103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). The Supreme Court has recently stated that, “[A] patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art,” and that “A court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.” *KSR Intern. Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1731.



***Omitted Features of Independent Claim 21***

Similar to claims 1, 15, and 16 discussed above, claim 21 recites a processor initiates the simultaneous execution of a performance test between a first device and a second device over each of the first and second transport networks simultaneously. For at least the reasons set forth above with respect to independent claims 1, 15, and 16, Beaven fails to disclose the simultaneous execution of a performance test between a first device and a second device over each of the first and second transport networks simultaneously, as recited in independent claim 21.

The Examiner further relied on Mayton to reject independent claim 21. *See* Final Office Action, page 15. However, Mayton fails to obviate the deficiencies of Beaven. Mayton appears to be directed to periodic testing of network performance that may be measured against a baseline value. *See* Mayton, Abstract. However, as Mayton fails to teach a processor initiates the simultaneous execution of a performance test between a first device and a second device over each of the first and second transport networks simultaneously, Mayton cannot overcome the deficiencies of Beaven.

As such, the prior art of record, taken alone or in hypothetical combination, fails to teach or suggest all elements of independent claim 21. Furthermore, based at least upon their dependency to claim 21, claims 22-29 are not obvious in view of the cited prior art. For at least these reasons among others, Appellants respectfully request that the Board overturn the rejections under 35 U.S.C. § 103(a) of independent claim 21, as well as all claims depending therefrom.

**D. Ground of Rejection No. 4:**

The Examiner rejected claims 10, 11, and 14 under 35 U.S.C. §103(a) as being anticipated by Beaven in view of Mayton and further in view of Silva. Appellants respectfully traverse this rejection. Claims 10, 11, and 14 depend from independent claim 1. Appellants respectfully submit that Silva fails to overcome the deficiencies of the applied prior discussed above with respect to independent claim 1. Accordingly, based at least on their dependency from independent claim 1, Appellants submit that claims 10, 11, and 14 are not obvious in view of the cited prior art. As such, for at least these reasons among others, Appellants respectfully request that the Board overturn the rejections under 35 U.S.C. § 103(a) of claims 10, 11, and 14.

**E. Ground of Rejection No. 5:**

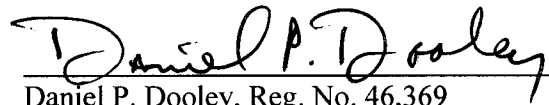
The Examiner rejected claims 12 under 35 U.S.C. §103(a) as being anticipated by Beaven in view of Mayton and further in view of Zhou. Appellants respectfully traverse this rejection. Claim 12 depends from independent claim 1. Appellants respectfully submit that Zhou fails to overcome the deficiencies of the applied prior art discussed above with respect to independent claim 1. Accordingly, based at least on its dependency from independent claim 1, Appellants submit that claim 12 is not obvious in view of the cited prior art. As such, for at least these reasons among others, Appellants respectfully request that the Board overturn the rejection under 35 U.S.C. § 103(a) of claim 12.

**Conclusion**

In summary, Appellants respectfully request that the Board reverse the final rejection of all the pending claims. The Appellants respectfully pray that the Board reconsider and direct the allowance of all pending claims in the application.

Respectfully submitted,

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## VIII. CLAIMS APPENDIX

1. (Previously presented) A method performed by one or more components in a network comprising a plurality of paths between a first device and a second device, the method comprising:

conducting a first performance test of a first type over a first path of the plurality of paths between the first and second devices;  
conducting a second performance test of the first type over a second path of the plurality of paths between the first and second devices; and  
wherein a processor initiates the simultaneous execution of the first and the second non-sequential performance tests.

2. (Original) The method of claim 1, wherein the first performance test produces a first set of results;

wherein the second performance test produces a second set of results; and  
further comprising presenting a service level performance comparison based on the first and second sets of results.

3. (Original) The method of claim 2, wherein the first performance test includes a plurality of first individual performance tests performed over an extended time duration; and the second performance test includes a plurality of second individual performance tests performed over the extended time duration.

4. (Original) The method of claim 3, wherein each of the pluralities of first and second individual performance tests are performed at roughly periodic intervals over the extended time duration.

5. (Original) The method of claim 1, wherein the first path transverses a first access network, a first transport network, and a second access network; and the second path transverses the first access network, a second transport network, and the second access network.

6. (Original) The method of claim 1, further comprising receiving a scheduling request representing the first and second performance tests.

7. (Original) The method of claim 6, wherein the scheduling request is received by a scheduling system; and the scheduling system communicates a first indication of the request to the first device.

8. (Original) The method of claim 7, wherein the scheduling system further communicated a second indication of the request to the second device.

9. (Original) The method of claim 6, further comprising scheduling the first and second performance tests based on the scheduling request and a random time component.

10. (Original) The method of claim 6, further comprising determining whether the scheduling request is authorized.

11. (Original) The method of claim 10, further comprising indicating that the scheduling request is not authorized.

12. (Original) The method of claim 6, further comprising determining whether the scheduling request conflicts with a second scheduling request.

13. (Original) The method of claim 6, further comprising determining whether a number of scheduled tests exceeds a first threshold number for the first device or exceeds a second threshold number for the second device.

14. (Original) The method of claim 13, further comprising indicating a failed scheduling request.

15. (Previously presented) A computer-readable medium containing computer-executable instructions for performing a method by steps comprising:

conducting a first performance test of a first type over a first path of a plurality of paths between a first and second devices;  
conducting a second performance test of the first type over a second path of the plurality of paths between the first and second devices; and  
wherein a processor initiates the simultaneous execution of the first and the second non-sequential performance tests.

16. (Previously presented) A network comprising:  
a plurality of paths between a first device and a second device;  
means for conducting a first performance test of a first type over a first path of the plurality of paths between the first and second devices;  
means for conducting a second performance test of the first type over a second path of the plurality of paths between the first and second devices; and  
wherein a processor initiates the simultaneous execution of the first and the second non-sequential performance tests.

17. (Original) The network of claim 16, wherein said means for conducting the first performance test includes means for generating a first set of results;  
wherein said means for conducting the second performance test includes means for generating a second set of results; and  
further comprising means for presenting a service level performance comparison based on the first and second sets of results.

18. (Original) The network of claim 16, wherein the first path transverses a first access network, a first transport network, and a second access network; and the second path transverses the first access network, a second transport network, and the second access network.

19. (Original) The network of claim 16, further comprising means for receiving a scheduling request representing the first and second performance tests.

20. (Original) The network of claim 19, further comprising means for scheduling the first and second performance tests based on the scheduling request and a random time component.

21. (Previously presented) A network comprising:  
a first device coupled to a first access network;  
the first access network coupled to a first and a second transport networks;  
a second access network coupled to the first and the second transport networks;  
a second device coupled to the second access network; and  
wherein a processor initiates the simultaneous execution of a performance test  
between the first device and the second device over each of the first and  
second transport networks simultaneously.

22. (Original) The network of claim 21, wherein the first device is coupled to a first router, wherein the first router selectively routes performance testing packets received from the first device over a first path to the first transport network and a second path to the second transport network.

23. (Original) The network of claim 21, further comprising a performance test scheduler.

24. (Original) The network of claim 23, further comprising a client device, wherein the client device transmits one or more scheduling requests for the performance test.

25. (Original) The network of claim 24, further comprising a results collector for receiving a set of results associated with the performance test.

26. (Original) The network of claim 25, wherein the results collector transmits at least a subset of the set of results to the client device.

27. (Original) The network of claim 23, wherein the performance test scheduler communicates a scheduling instruction associated with the performance test to the first device.

28. (Original) The network of claim 27, wherein the performance test scheduler communicates a second scheduling instruction associated with the performance test to the second device.

29. (Original) The network of claim 28, wherein the second device includes a test mode; and wherein the second device enters the test mode in response to receiving the second scheduling instruction.



## **IX. EVIDENCE APPENDIX**

None.

## **X. RELATED PROCEEDINGS APPENDIX**

There exist no relevant related proceedings concerning this Appeal before the Board.